

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

7 | CHARLES DAVID GORDON,

Petitioner,

No. C 12-0769 PJH

V.

STAY ORDER; ADMINISTRATIVE CLOSURE

ANTHONY HEDGPETH, Warden,

Respondent.

Petitioner Charles David Gordon (“Gordon”), a state prisoner, has filed a petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254.

BACKGROUND

16 On October 2, 2009, following a bench trial in the Napa County Superior Court,
17 Gordon was convicted of two counts of rape under California Penal Code § 261(a)(2); oral
18 copulation with a minor under California Penal Code § 288a(b)(1); sodomy by force under
19 California Penal Code §286(c); and infliction of corporal injury on a cohabitant under
20 California Penal Code § 273.5(a)(5). Additionally, the court found true a multiple victim
21 allegation under California Penal Code § 667.61(b) as to the rape counts. On November 4,
22 2009, the trial court sentenced Gordon to forty-nine years and eight months to life in prison.

23 On November 30, 2009, Gordon appealed to the California Court of Appeal, which
24 affirmed his conviction on September 29, 2010. The California Supreme Court denied
25 review on December 15, 2010.¹

26 On November 22, 2011, Gordon filed a habeas petition with the Napa County

¹Gordon did not file a petition for writ of certiorari with the United States Supreme Court. The deadline for filing such a petition was March 15, 2011.

1 Superior Court, which that court dismissed as untimely on December 5, 2011. On January
2 3, 2012, Gordon filed a habeas petition with the California Court of Appeal. On January 17,
3 2012, the California Court of Appeal denied the petition without prejudice. It noted that
4 Gordon raised new arguments regarding the timeliness of his habeas petition that were not
5 previously presented to the Napa County Superior Court, and as a result, ruled that Gordon
6 had not exhausted his habeas remedy with the superior court. In accordance with that
7 order, on January 20, 2012, Gordon filed an amended petition with the Napa County
8 Superior Court. On February 1, 2012, that court set a briefing schedule on the petition.

9 Meanwhile, on February 16, 2012, while Gordon's habeas petition was pending in
10 state court, he filed the instant federal habeas petition raising thirty-eight claims for relief.
11 Additionally, on February 21, 2012, Gordon filed a motion to stay the federal proceedings
12 pending the state court habeas proceedings.

DISCUSSION

A. Legal Standard

15 This court may entertain a petition for writ of habeas corpus "in behalf of a person in
16 custody pursuant to the judgment of a State court only on the ground that he is in custody
17 in violation of the Constitution or laws or treaties of the United States." 28 U.S.C. §
18 2254(a). It shall "award the writ or issue an order directing the respondent to show cause
19 why the writ should not be granted, unless it appears from the application that the applicant
20 or person detained is not entitled thereto." 28 U.S.C. § 2243.

B. Petitioner's Legal Claims²

22 Gordon raises thirty-eight claims for federal habeas relief, including that:

23 (1) his statements were taken and introduced at trial in violation of his
24 Sixth Amendment rights under *Massiah v. United States*, 377 U.S. 201

25 _____
26 ²The court notes that in his list of claims, many of Gordon's claims were not stated as
27 federal constitutional claims. Instead, Gordon phrased many as claims that the state court or
28 his counsel "erred" under state law. However, the court's review of Gordon's subsequent
discussion of the claims in most cases enabled it to ascertain that Gordon was indeed raising
the claim(s) as one(s) based on federal constitutional law, and the court has phrased the
claims accordingly in its listing of the claims in this order.

1 (1964);

2 (2) the trial court improperly admitted statements from Gordon's April 1, 2009
3 interrogation taken in violation of his *Miranda* rights;

4 (3) prosecutorial misconduct in connection with the introduction of Gordon's
5 statements violated his constitutional rights;

6 (4) he received ineffective assistance of counsel when his trial counsel failed to
7 object to the introduction of statements taken in violation of *Massiah*;

8 (5) he received ineffective assistance of counsel when his trial counsel failed to
9 object to the introduction of statements taken in violation of *Miranda*;

10 (6) his due process rights were violated when the state obtained evidence by
11 virtue of outrageous government conduct under *Rochin v. California*, 342 U.S.
12 165 (1952);

13 (7) he received ineffective assistance of counsel when his trial counsel failed to
14 object to the introduction of evidence obtained in violation of *Rochin*;

15 (8) the trial court's admission of highly prejudicial opinion testimony from Jane
16 Doe #2 violated his due process rights;

17 (9) the trial court's admission of prejudicial and cumulative testimony about the
18 rape of Jane Doe #2 violated his due process rights;

19 (10) the trial court's admission of testimony regarding Gordon's prior sexual
20 molestation incident violated his due process rights;

21 (11) prosecutorial misconduct in connection with claims 8, 9, and 10, violated his
22 due process rights;

23 (12) he received ineffective assistance of counsel when his counsel failed to object
24 to the trial court's admission of the evidence discussed in claims 8, 9, and 10
25 above and to the prosecution's misconduct discussed in claim no. 11 above;

26 (13) the trial court violated his Sixth Amendment Confrontation Clause rights and
27 his due process rights when it excluded evidence regarding a video involving
28 Gordon and Jane Doe #2;

29 (14) the trial court violated his Sixth Amendment Confrontation Clause rights and
30 his due process rights when it limited his cross-examination regarding Jane
31 Doe #1's alleged consent to the rape charge;

32 (15) the trial court violated his Sixth Amendment Confrontation Clause rights and
33 his due process rights when it excluded evidence regarding Jane Doe #1's
34 credibility;

35 (16) the trial court violated his Sixth Amendment Confrontation Clause rights and
36 his due process rights when it excluded evidence regarding Jane Doe #1's
37 other sexual activities;

38 (17) the trial court violated his Sixth Amendment Confrontation Clause rights and

his due process rights when it excluded evidence regarding Jane Doe #2's drug habits;

- (18) the trial court violated his Sixth Amendment Confrontation Clause rights and his due process rights when it excluded evidence regarding Jane Doe #1's drug habits;
- (19) he received ineffective assistance of counsel when his counsel failed to object to the trial court's exclusion of the evidence discussed in 13-18 above;
- (20) the trial court's admission of testimony from a police officer regarding Jane Doe #1's statements violated his Sixth Amendment Confrontation Clause rights;
- (21) the trial court's admission of testimony from a sexual assault nurse regarding Jane Doe #1's statements during a sexual assault examination violated his Sixth Amendment Confrontation Clause rights;
- (22) the trial court's admission of testimony from a witness regarding Jane Doe #2's statements the day following the rape violated his Sixth Amendment Confrontation Clause rights;
- (23) the trial court's admission of his jailhouse letters violated his due process rights;
- (24) he received ineffective assistance of counsel when his counsel failed to object to the trial court's admission of his jailhouse letters;
- (25) he received ineffective assistance of counsel when his counsel failed to conduct an adequate pretrial investigation regarding Jane Doe #1 and Jane Doe #2, including:
 - a. evidence that witness Marlene Maples had a bias and motive to lie resulting from her distribution of methamphetamine to Jane Doe #2;
 - b. statements from Zach McCluskey regarding the extent of Jane Doe #2's drug use on the day of the rape;
 - c. additional details regarding Jane Doe #2's sexual practices with Gordon;
 - d. details regarding why Jane Doe #2 decided to press charges against Gordon after initially refusing to do so;
 - e. inconsistencies between Detective Sandler's police report and Detective Elia's police report regarding Jane Doe #2;
 - f. Jane Doe #1's diversion contract;
 - g. Jane Doe #1's intoxication on the night of the rape; and
 - h. Jane Doe #1's sexual relationship with Victor Rodriguez.
- (26) he received ineffective assistance of counsel when his counsel failed to

1 litigate certain issues and motions during the pre- and post-trial proceedings,
2 including:

3 a. counsel's failure to file an opposition to the motions contained in the
4 state's trial brief;

5 b. counsel's failure to file a motion to sever his trial of the counts by
6 victim;

7 c. counsel's failure to file motions in limine to exclude inflammatory and
8 inadmissible evidence;

9 d. counsel's motion to exclude bad act evidence and his response to the
10 state's motion to introduce such evidence and

11 e. counsel's failure to file a sentencing memorandum.

12 (27) his due process rights were violated when the victims' advocate participated
13 in the case investigation and spoke with complaining witnesses;

14 (28) he received ineffective assistance of counsel when his counsel failed to object
15 to the victim advocate's conduct in the case;

16 (29) his due process rights were violated because the evidence introduced
17 regarding the rape and sodomy counts was insufficient;

18 (30) his due process rights were violated because the evidence introduced
19 regarding a corporal injury on a cohabitant count was insufficient;

20 (31) he received ineffective assistance of counsel regarding his defense of
21 reasonable but mistaken belief of consent;

22 (32) the trial court's sentence violated his due process rights and constituted cruel
23 and unusual punishment under the Eighth Amendment;

24 (33) he received ineffective assistance of counsel at the sentencing proceedings;

25 (34) the admission of his uncharged conduct violated his due process rights;

26 (35) the trial court's sentence violated his due process rights and constituted cruel
27 and unusual punishment under the Eighth Amendment;

28 (36) he received ineffective assistance from appellate counsel when his counsel
denied his claims as untimely;

29 (37) the Napa County Superior Court violated his constitutional rights when it
30 dismissed his claims as untimely;

31 (38) cumulative error rendered his conviction unconstitutional.

32 The court DISMISSES two of the claims at this stage - claim numbers 35 and 37.

33 First, claim number 35 is duplicative of claim no. 32 and is DISMISSED for this reason.

1 Second, claim number 37 is not a cognizable claim. The court will review any state court
2 dismissals for timeliness under state law only in conjunction with determining whether
3 Gordon has procedurally defaulted the claims set forth in this petition. Moreover, the Napa
4 County Superior Court order of which Gordon complains is not even a final order as
5 proceedings are ongoing in that court. For this reason, claim number 37 is dismissed.

6 Liberally construed, the remaining thirty-six claims appear colorable under 28 U.S.C.
7 § 2254. However, as noted by Gordon, only three of the thirty-six remaining claims have
8 been exhausted: claim nos. 30, 34, and 35. The remaining thirty-three claims are in the
9 process of being litigated in concurrent state court habeas proceedings.

10 **C. Petitioner's Stay Request**

11 Gordon requests the court stay the instant petition while he exhausts the remaining
12 claims in state court. District courts have the authority to stay mixed petitions to allow for
13 exhaustion. *See Rhines v. Webber*, 544 U.S. 269, 274-75 (2005). However, such stays
14 can only be granted upon a showing of good cause for petitioner's failure to exhaust the
15 issues before filing the federal petition, and a showing that the issues which the petitioner
16 proposes to exhaust are "potentially meritorious." *Id.*

17 With respect to good cause, the court notes that Gordon is currently attempting to
18 exhaust his claims in state court and that he filed the instant "protective" federal habeas
19 petition prior to the expiration of AEDPA's statute of limitations. Accordingly, there is
20 nothing to suggest that Gordon has engaged in dilatory tactics or that he has failed to
21 exercise diligence in bringing his claims before the state court and this court.

22 The court does, however, have some concern regarding the quantity and nature of
23 the claims brought by Gordon in the instant petition. Gordon appears to have raised every
24 claim he possibly could without much thought to condensing and/or prioritizing his claims,
25 and the court questions whether the remaining **thirty-six** claims are all "potentially
26 meritorious." Nevertheless, the court will stay the instant petition to afford the state courts
27 the opportunity to act on each of the claims raised by Gordon. However, once the state
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1 court proceedings have resolved, the court may take a closer look at the thirty-six claims
2 contained in the instant petition, and may require Gordon to further amend his federal
3 habeas petition if appropriate.

4 **CONCLUSION**

5 For the foregoing reasons, Gordon's request for a stay is GRANTED, and the case
6 is hereby STAYED to allow Gordon to exhaust his unexhausted claims in state court. If
7 Gordon is not granted relief in state court, he may return to this court and ask that the stay
8 be lifted. The stay is subject to the following condition: Gordon must notify this court
9 **within thirty days** after the state courts have completed their review of his claims or after
10 they have refused review of his claims. If this condition of the stay is not satisfied, this
11 court may vacate the stay and act on this petition.

12 The clerk shall administratively close this case. The closure has no legal effect; it is
13 purely a statistical matter. The case will be reopened, the stay vacated, and an order to
14 show cause issued upon notification by petitioner in accordance with the conditions set
15 forth above.

16 **IT IS SO ORDERED.**

17 Dated: March 28, 2012



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PHYLLIS J. HAMILTON
United States District Judge
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